

Winter 1973

Judges—Missouri Standards of Fitness and Methods Available to Deal with Unfitness

R. James Stilley Jr.

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

R. James Stilley Jr., *Judges—Missouri Standards of Fitness and Methods Available to Deal with Unfitness*, 38 Mo. L. Rev. (1973)

Available at: <https://scholarship.law.missouri.edu/mlr/vol38/iss1/9>

This Comment is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

JUDGES—MISSOURI STANDARDS OF FITNESS AND METHODS AVAILABLE TO DEAL WITH UNFITNESS

I. INTRODUCTION

Because we supposedly no longer depend upon the strength of our right arm to insure individual justice, we are concerned with the factors that determine the quality of justice we receive. In addition to being concerned about law enforcement, the selection of legislators, the fairness of laws, and the qualifications of attorneys, we are concerned about the quality of the judiciary.

Judges possess unique power to affect individual lives through their interpretations and decisions. To a person involved in a legal proceeding, much depends upon the wisdom, demeanor, fairness, alertness, health, competence, and personality of the judge presiding over the case. Moreover, contact between the individual and the judiciary is often personal; that the judiciary is generally fair and able is of little comfort to a litigant exposed to an unfit judge. For our judicial system to command respect, the public must have confidence in each judge. A judge's behavior off the bench, as well as his courtroom performance, may destroy this confidence.

One observer wrote that the judicial function most nearly approaches the province of divinity.¹ Judges will never attain divine perfection; occasionally, because of the frailty of man, they fail to meet even minimal judicial standards. When this happens, the question is: "Who should judge the judges?" Missouri has recently initiated new procedures in the area of judicial retirement, removal, and discipline. This article will discuss existing Missouri standards of conduct and fitness for judges and study Missouri's mechanisms for dealing with judicial unfitness.

II. THE PROBLEM OF JUDICIAL UNFITNESS

Judicial unfitness exposes itself as either disability or misconduct. No jurisdiction can claim immunity from either.

A. *Judicial Misconduct*

Judicial misconduct may occur either on or off the bench. Such misconduct usually receives wide publicity, with a resulting loss of public confidence in the court system. In Missouri during the 1930's and 1940's, the alleged control of many Missouri judges by the political boss T. J. "Tom" Pendergast was well-publicized throughout the nation.² After a 1940 Missouri constitutional amendment³ that reformed the methods of selecting judges for specified courts, Missouri enjoyed a long period of virtually no major incidents of judicial misconduct.⁴ During the 1960's, however, three events shook the confidence of Missourians in their judiciary.

The first instance involved St. Louis County Circuit Court Judge Virgil A. Poelker. In May, 1961, one of Poelker's creditors filed suit against him

1. Honigman, *Judicial Amendment*, 47 MICH. S.B.J. 28, 29 (1968).

2. Braithwaite, *Removal and Retirement of Judges in Missouri: A Field Study*, 1968 WASH. U.L.Q. 378, 412.

3. MO. CONST. art. V., § 29.

4. Braithwaite, *supra* note 2, at 411.

on a \$500 debt, which Poelker then paid. Another of Poelker's creditors won a \$3,985 default judgment against him. In June, 1961, a grand jury indicted Judge Poelker for failing to file a state income tax return in 1959. On April 14, 1962, Poelker was convicted on this charge, but the conviction was reversed on appeal because of improper venue. In October, 1962, Poelker was arrested and charged with assault following a fight at a bar between himself and one of his creditors. In December, 1962, Poelker attempted to resume his judicial duties, but his fellow judges enjoined him from performing any judicial function and from using his office.⁵

On January 22, 1963, the Missouri House of Representatives approved an impeachment resolution against Judge Poelker alleging 17 articles of misconduct. The resolution against Poelker of fraud by false representations about his financial status made in order to obtain loans, with failing to file a state income tax return in 1959, and with filing a false one in 1960. Other allegations included mishandling of financial affairs, improper attempt to influence a grand jury, and abuse of judicial authority. On March 13, 1963, five days before his impeachment trial was to open in the Missouri supreme court, Judge Poelker resigned. He had drawn \$31,000 in salary over a 19-month period without hearing a single case.⁶

In the spring of 1966, a grand jury indicted Probate Judge John Lodwick, Jr., of Clay County on seven counts of embezzling fines that he had levied during 1961 when he was a magistrate judge. Judge Lodwick was not removed from office until his bid for re-election failed and his term expired on January 1, 1967.⁷ In May 1968, he was convicted in federal court of evading payment of federal income taxes on the money that he allegedly embezzled.

Finally, in 1968, a grand jury charged St. Louis County Circuit Court Judge John D. Hasler with becoming improperly involved with a woman divorce defendant in his court. Judge Hasler's trial resulted in a misdemeanor conviction for "willful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity."⁸ The Missouri House of Representatives voted four articles of impeachment against Judge Hasler on June 28, 1968. On August 23, 1968, three days before his impeachment trial, Judge Hasler resigned.⁹

B. Judicial Disability

Examples of the kinds of disability under consideration here are poor hearing, failing eyesight, mental disorders, senility, or crippling ailments that prevent a judge from properly performing his duties.

Prior to 1945, Missouri's General Assembly had the power, if the Governor approved the actions, to retire judges for disability; such removal required a two-thirds vote of each house.¹⁰ The 1945 Missouri Constitution shifted this power from the General Assembly to a judicial committee,¹¹

5. *Id.* at 415-19.

6. *Id.*

7. *Id.* at 419-22.

8. § 558.110, RSMo 1969.

9. Braithwaite, *supra* note 2, at 422-26.

10. Mo. CONST. art. VI, § 41 (1875).

11. Mo. CONST. art. V, § 27 (1945).

which could mandatorily retire a judge in the event of the judge's inability to discharge the duties of his office efficiently by reason of "continued sickness or physical or mental infirmity."¹² This committee, the Committee on Retirement of Judges and Magistrates, functioned for over 25 years, until terminated by a constitutional amendment in 1970.¹³

By the end of 1966 the committee had retired 30 judges.¹⁴ The committee acted only upon information in writing charging that a judge was disabled. In practice, the 30 judges retired requested retirement and initiated the proceedings themselves. This is misleading, however, because in most instances the judge did this only after the state bar association's Judicial Retirement Committee had persuaded him to do so. Evidence indicates that both committees had histories of informality and low pressure, but that they were often ineffective and slow to achieve results.¹⁵

III. MISSOURI STANDARDS OF JUDICIAL FITNESS

Establishing standards of judicial fitness presupposes tentative answers to the difficult question of what society has a right to expect from judges. This section sets out the Missouri standards with respect to official activity, off-bench activity, and physical and mental condition of judges.

A. Missouri Standards of Judicial Conduct While Performing Official Functions

The pertinent standards are in the Missouri constitution, statutes, supreme court rules, and the canons of judicial ethics.

1. Missouri Constitution and Statutes

The following is an exhaustive list of relevant constitutional and statutory provisions that set forth standards and provide sanctions against violators:

a. Article VII, section 1 of the Missouri Constitution forbids judges of the supreme court, courts of appeal, and circuit courts¹⁶ from committing crime, or being guilty of "misconduct, habitual drunkenness, willful neglect of duty, corruption in office, incompetency, or any offense involving moral turpitude or oppression in office." A violation of this section is grounds for impeachment.¹⁷

b. Appointing to public office or employment any relative within the fourth degree by consanguinity or affinity is prohibited by article VII, section 6. A Missouri judge guilty of such nepotism forfeits his office. Presumably an action in quo warranto is the proper enforcement method.

c. Intoxication while performing any official act or duty is a misdemeanor under section 105.250.¹⁸ A violator is subject to imprisonment or

12. *Id.*

13. Mo. CONST. art. V, § 27.

14. Braithwaite, *supra* note 2, at 398.

15. *Id.* at 397-407.

16. Section 479.080, RSMo 1969, extends this prohibition to judges of the St. Louis Court of Criminal Correction.

17. See pt. IV, § D of this comment for a discussion of the remedy of impeachment.

18. All statutory references in the text of this article are to the 1969 edition of the Revised Statutes of Missouri.

fine, or both. In addition, the statute provides that if the judge is not subject to impeachment, his office is to be adjudged forfeited and vacant upon conviction, with the proviso that only a circuit court or criminal court of record has the power to adjudge any office forfeited and vacant.

d. Any judge who discloses a secret criminal indictment¹⁹ before the defendant is arrested or answers is guilty of a misdemeanor under section 545.090. This section contains no punishment provision, but section 558.160 provides that whenever a judge is convicted of any willful misconduct or a misdemeanor in office and the statute makes no provision for punishment, the sanction is a fine or imprisonment, or both.

e. Under section 106.220, persons elected or appointed to any county, city, or town office in the state, except those officers subject to removal by impeachment, are subject to removal²⁰ or forfeiture of office if guilty of any of the following: (1) Failure to personally devote time to the duties of the office; (2) any willful or fraudulent violation or neglect of any official duty; (3) knowingly or willfully failing or refusing to perform any official act or duty that the law requires him to perform with respect to the enforcement or execution of the criminal laws of Missouri. Although elected or appointed officials not subject to impeachment would presumably include all probate, magistrate, and municipal judges, there are no reported cases on the use of this procedure against a judge.

f. All judges are forbidden by section 558.020 from directly or indirectly accepting any gift, consideration, gratuity, or reward constituting a bribe for either past or future favoritism. Section 558.050 prohibits the procurement of judicial office by bribe, section 558.090 prohibits the solicitation of bribes by all judges and magistrates, and section 558.100 provides sanctions for the sale or granting of the authority to discharge any of the duties of the office.

Section 106.280 generally proscribes fraud by a judge in connection with his official functions, and section 558.120 forbids "willful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity or under color of his office."

Judges guilty of any of the offenses set forth in the preceding paragraph are not only subject to fine and imprisonment, but under section 558.130 the judge also loses his right to vote and the right to ever hold another office of honor or trust.

g. Any probate judge who knowingly and willfully commits any act prohibited by law or refuses to perform a required duty is guilty of a misdemeanor; upon conviction, the judge is subject to a suit for damages by injured parties under section 481.240.

19. Section 545.080 provides that certain criminal indictments may be confidential.

20. The sections following § 106.220 set forth the procedure for removal. Section 106.230 provides that any person may file an affidavit setting forth his knowledge of facts of an offense under § 106.220 with the clerk of the court having jurisdiction over the offense or with the prosecuting attorney. The prosecuting attorney then has a duty to file a complaint in the circuit court if in his opinion the facts justify prosecution. Trial is held in the circuit court, and § 106.270 provides for either acquittal or a judgment of removal. Appeal is to the Missouri Supreme Court.

h. Under section 558.140, judges may not demand or receive any fee for performance of their official duties that is not due them. Violation is a misdemeanor.

i. Section 558.155 provides that judges may not discriminate against any properly qualified state employee or applicant for state employment (e.g., as a court clerk) "on account of race, creed, color, or national origin...." Violation is a misdemeanor.

j. Section 558.220 prohibits public officials (including judges) from loaning out public money under their control. In addition, section 558.240 provides that a judge may not receive any benefit from depositing funds or securities under his control with a particular party.

The sanction for loaning public money is imprisonment or fine.

k. Judges may not accept guilty pleas in criminal cases until the person charged has had a reasonable opportunity to talk to a friend and an attorney. Nor may a judge accept a plea of guilty anywhere other than the place where the court is held. Any judge, magistrate, or police judge who violates these provisions is guilty of a misdemeanor under 558.380; upon conviction, he forfeits his office and becomes subject to a fine and or jail sentence.

2. The Canons of Judicial Ethics (Missouri Supreme Court Rule Two) and the ABA Code of Judicial Conduct

a. Background

In 1924, the American Bar Association approved the Canons of Judicial Ethics as proposed by a special committee chaired by Chief Justice William Howard Taft. The preamble to the Canons declares that because "ethical standards tend to become habits of life," the A.B.A. adopts the Canons as a suggested and proper guide to govern the "personal practice of members of the judiciary in the administration of their office." The preamble declares that the Canons indicate "what the people have a right to expect from [their judges]."

A majority of the state supreme courts have adopted these original Canons. The Judicial Conference of Missouri adopted them in 1951. The Missouri Supreme Court adopted the Canons, with minor modification, by court rule effective March 1, 1967.

Although the Canons are still in effect in Missouri,²¹ on August 16, 1972, the American Bar Association adopted the Code of Judicial Conduct (hereinafter referred to as the Code) to replace the Canons of Judicial Ethics (hereinafter referred to as the Canons). The Code is the product of the Special Committee on Standards of Judicial Conduct, chaired by former California Chief Justice Roger Traynor. The preface to the Code states that as to A.B.A. members it does more than merely make suggestions; it establishes mandatory standards, unless specific sections otherwise indicate. This is a major change from the Canons. As many Missouri judges are members of the A.B.A., this comment will discuss both the old and the new standards.

21. See Mo. Sup. Ct. R. 2.

B. *General Differences Between the Canons of Judicial Ethics and the Code of Judicial Conduct*

Organizational differences exist between the Code and the Canons. The Canons presented suggested guidelines in the form of 36 canons, each dealing with a relatively specific topic. The Code makes 7 general statements in the form of canons; text dealing with more specific situations follows each of the 7 canons. The more involved texts are in outline form with occasional commentaries. The 7 canons are followed by 2 sections entitled "Compliance with the Code of Judicial Conduct" and "Effective Date of Compliance." The former deals with the applicability of the Code to part-time, *pro tempore*, and retired judges; the latter states how one can comply with the Code after it becomes applicable to him.

The Canons emphasized positive standards for judges to meet in performance of their official duties; the Code is more concerned with prescriptions against some kinds of conduct by judges relating to non-judicial activities. Although the Canons dealt with some specific activities, the guidelines were generally vague. As a result, much was left to individual discretion. The Code attempts to remedy this by providing specific guidelines.

c. *Adjudicative Responsibility*

What standards of conduct control during performance of official adjudicative functions? The Canons devote a substantial majority of the 36 canons to this topic; the Code of Judicial Conduct covers the topic basically in one canon. Little conflict exists on this topic between the Code and the Canons. Both axiomatically exclaim that judges should avoid impropriety and the appearance of impropriety,²² and that they should be patient, impartial,²³ prompt,²⁴ and courteous to litigants, jurors, witnesses, and lawyers.²⁵

The Code deals in depth with the problems of broadcasting, televising, recording, and photographing in the courtroom and immediately adjacent areas during sessions of court or recesses between sessions. The Canons expressly forbids all such activity except the broadcasting or televising of naturalization proceedings if done with proper dignity.²⁶ The Code expands the exception to give judges discretion to allow the following: (1) Use of electronic or photographic equipment for the presentation of evidence, for providing a permanent record, or for purposes of judicial administration; (2) reproduction of investitive, ceremonial, or naturalization proceedings; and (3) photographic or electronic reproduction of "appropriate" court proceedings when the reproduction will be used solely for instructional purposes by educational institutions after strict requirements are met (including consent from all parties and witnesses involved).²⁷

The Canons set forth standards for judges in writing judicial opinions.

22. ABA CANONS OF JUDICIAL ETHICS No. 4 [hereinafter cited as ABA Canons]; ABA CODE OF JUDICIAL CONDUCT No. 3 [hereinafter cited as ABA CODE].

23. ABA CANONS No. 5; ABA CODE No. 3.

24. ABA CANONS No. 7; ABA CODE No. 3 (A) (5).

25. ABA CANONS Nos. 9, 10; ABA CODE No. 3 (A) (3).

26. ABA CANONS No. 35.

27. ABA CODE No. 3 (A) (7).

Judges are told to make clear the reasons for their decisions, to make opinions as concise as reasonably possible, and to write dissenting opinions only out of conscientious differences of opinion on fundamental principles.²⁸ The Code never specifically mentions this area. Similarly, the Code never discusses, as do the Canons, such topics as a judge's right to intervene during a trial,²⁹ continuances³⁰ or review,³¹ the public interest,³² or the judge's influence on the development of the law.³³

The Canons provide that a judge should disqualify himself from a proceeding when a "near relative" is a party or whenever it would appear that any person involved may have undue influence over him.³⁴ The Code sets out more specific guidelines in this area. For example, it provides that a judge should disqualify himself if he, his spouse, a person within the third degree of relationship to either of them, or the spouse of such a person, is involved in a suit as a party, a lawyer, or a material witness, or will be substantially affected by the outcome.³⁵ A judge's self-imposed disqualification may be withdrawn upon written consent by all concerned parties and lawyers.³⁶

d. Administrative Responsibilities

The Code and the Canons agree that judges should avoid appointments based on nepotism or favoritism.³⁷ While both instruct a judge to take appropriate disciplinary measures to correct unprofessional conduct of lawyers,³⁸ only the Code requires the same for such conduct by another judge.³⁹

B. Missouri Standards of Judicial Conduct for Off-Bench Activity

1. Missouri Constitutional Provisions and Statutes

The following is an exhaustive list of relevant constitutional provisions and statutes:

a. As stated earlier,⁴⁰ article VII, section 1 of the Missouri Constitution provides that judges of the supreme court, courts of appeals, and circuit courts are subject to impeachment if they commit crimes or are guilty of misconduct or habitual drunkenness.⁴¹ Presumably, these standards apply to both official and off-bench activity.

b. Article V, section 24 of the constitution prohibits judges and magistrates from practicing law or receiving additional compensation from any public service or from the practice of law.

28. ABA CANONS No. 19.

29. *See id.* No. 15.

30. *See id.* No. 18.

31. *See id.* No. 22.

32. *See id.* No. 2.

33. *See id.* No. 20.

34. ABA CANONS No. 13.

35. ABA CODE No. 3 (C) (1) (d).

36. *Id.* No. 3 (D).

37. ABA CANONS No. 12; ABA CODE No. 3 (B) (4).

38. ABA CANONS No. 11; ABA CODE No. 3 (B) (3).

39. ABA CODE No. 3 (B) (3).

40. *See* pt. III, § A (1) (a) of this comment.

41. The same standards apply to the judges of the St. Louis Court of Criminal Correction. § 479.090, RSMo 1969.

c. According to section 558.340, any judge who accepts a free transportation pass is guilty of a misdemeanor punishable by fine. Upon conviction the judge forfeits his office. If impeachment is not available, the convicting court must adjudge the office forfeited and vacant if it has the power to do so. The statute further provides that only circuit courts and criminal courts of record have power to adjudge an office forfeited and vacant.

d. Section 481.130 provides that probate judges may not draft or witness any will, or make any settlement for any administrator, executor, or guardian over which his court has jurisdiction. Election to the position of probate judge disqualifies that person from being a guardian in any court of the state.

e. Section 559.470 provides that conviction of any of several crimes⁴² disqualifies a person from ever holding any office of honor, trust or profit within Missouri. Under section 558.130, conviction of an incumbent requires forfeiture of his office.

2. The Canons of Judicial Ethics (Missouri Supreme Court Rule Two) and the ABA Code of Judicial Conduct

a. Generally

While the Canons of Judicial Ethics generally pertain to official conduct, the Code of Judicial Conduct is more concerned with a judge's off-bench activity.⁴³ Of course, both stress that a judge should comply with the law, that he should avoid all impropriety and the appearance of impropriety, and that he should avoid providing grounds for suspicion that he uses his position to advance private interests. The overall theme of the Code is maintenance of unquestionable conduct and minimization of the risk of conflict between extra-judicial activities and official duties. Commentary in the Code says isolation of a judge from society is unwise,⁴⁴ yet the Code strictly circumscribes permissible off-bench activities. The Code covers with more specific guidelines every activity that the Canons discuss and boldly progresses into one new area.

b. Specific Activities

Treated by the Canons and the Code

The Canons declare without explanation that a judge should not solicit for charities.⁴⁵ The Code agrees,⁴⁶ but elaborates that a judge may participate in civic and charitable activities and may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization, subject to several enumerated limitations. One of the limitations prohibits judges from speaking or being the guest of honor at a fund-raising event.⁴⁷

42. These crimes include murder, mayhem, rape, seduction under promise of marriage, perjury, and forgery.

43. See pt. III, § A (2) (b), of this comment.

44. ABA CODE NO. 5 (A), commentary.

45. ABA CANONS NO. 25.

46. ABA CODE NO. 5 (B) (2).

47. *Id.* NO. 5 (B).

Both the Canons and the Code refer to the financial activities of judges. The Canons generally state that a judge should refrain from all personal investments in enterprises that are likely to come before his court and avoid relations that would arouse suspicion of impartiality and bias.⁴⁸ The Code adds that a judge may possess and manage investments, including real estate, but that he should not serve as an officer, director, manager, advisor, or employee of any business.⁴⁹ An exception to this is that a judge holding judicial office on the date the Code goes into effect may continue to serve as an officer, director, or non-legal advisor of a family business where the demands on his time and possibility of conflicts of interest are not substantial.⁵⁰ Both the Canons and the Code state that a judge should divest himself of interests that he ought not possess as soon as he can do so without serious financial loss.⁵¹

Because political bias may conflict with the judicial goal of impartiality, both Code and Canons generally discourage judges from being leaders in political parties, publicly endorsing political candidates, or paying assessments or contributing to party funds.⁵² The Code prohibits judges from attending political gatherings or buying political party dinner tickets.⁵³

When a judge holds office by election, different rules necessarily apply. The Canons and the Code allow a judge who attains office by election between competing candidates to attend political gatherings, speak at gatherings on his own behalf, and contribute to a political party.⁵⁴ Both agree that a judge should not announce his views on legal or political issues, or promise conduct other than judicial impartiality.⁵⁵ The Code specifically forbids the judge himself from soliciting or accepting campaign money. Rather, this may be done by a committee established by the judge for this purpose.⁵⁶ The judge should not be told the contributors' identity unless the law requires candidates to file a list of contributors.⁵⁷

The Canons say that a judge should not accept "gifts or favors" from litigants, lawyers who practice before him, or others whose interests are likely to come before his court.⁵⁸ Under the Code the judge and any member of his family residing in his household may accept a gift, bequest, favor, or loan only under enumerated circumstances.⁵⁹

The Canons say that a judge can be an executor or trustee if the fiduciary duties did not interfere or seem to interfere with the proper performance of his judicial functions.⁶⁰ On the other hand, the Code says a judge should not serve as an executor, administrator, trustee, guardian, or other fiduciary except for the estate, trust, or person of a member of his

48. ABA CANONS No. 26.

49. ABA CODE No. 5 (C) (2).

50. ABA CODE, *Effective Date of Compliance*.

51. ABA CANONS No. 26; ABA CODE No. 5 (C) (3).

52. ABA CANONS No. 28; ABA CODE No. 7 (A) (1).

53. ABA CODE No. 7 (A) (1) (c).

54. ABA CANONS No. 28; ABA CODE No. 7 (A) (2).

55. ABA CANONS No. 30; ABA CODE No. 7 (B) (1) (c).

56. ABA CODE No. 7 (B) (2).

57. *Id.*, commentary.

58. ABA CANONS No. 32.

59. ABA CODE No. 5 (C) (4).

60. ABA CANONS No. 27.

family, and then only if certain requirements are met.⁶¹ Under the Canons, judges may practice law only if local law so permits.⁶² The Code states that a judge should not practice law.⁶³ Under the Canons a judge could act as an arbitrator,⁶⁴ but the Code expressly forbids such activity⁶⁵ unless the judge serves as a judge only part-time.⁶⁶

Both the Canons and the Code permit a judge to lecture, write, or teach upon the subject of law.⁶⁷ Both encourage judges to participate in activities designed to study or improve the administration of justice.⁶⁸

c. Public Filing of Information about Outside Income

Canon 6 of the Code establishes a requirement that is not even implied in the Canons. It recognizes that the Code of Judicial Conduct permits compensation and expense reimbursements for certain quasi-judicial and extra-judicial activities. Besides stating that such compensation should be reasonable, Canon 6 of the Code requires the judge to file annually a public document containing information about the compensation such as the identity of the payor, amount of compensation, and services performed. The Code applies this requirement to any gift, bequest, favor, or loan with a value in excess of \$100.

C. *Missouri's Standards of Mental and Physical Fitness for Judges*

1. Missouri Constitution

Article V, section 27 (2) of the Missouri Constitution establishes a procedure to retire any Missouri judge who is "unable to discharge the duties of his office with efficiency because of permanent sickness or physical or mental infirmity." This procedure will be discussed in some detail later in this comment.⁶⁹

2. The Canons of Judicial Ethics (Missouri Supreme Court Rule Two) and the ABA Code of Judicial Conduct

The Code, like the Canons, fails to even mention disability. This is a deficiency in the new Code. As an approved guideline to instruct judges as to what society expects of them, it should provide that the public expects a judge to retire when he is unable to perform his judicial activities properly because of mental or physical impairment. Admittedly, concise guidelines as to when a judge should retire because of disability are dif-

61. ABA CODE No. 5 (D). An exception is that one holding judicial office on the date the Code becomes effective may "continue to act as [a] . . . fiduciary for the estate or person of one who is not a member of his family." *Id.*, *Effective Date of Compliance*.

62. ABA CANONS No. 31. Missouri Supreme Court Rule 2.31 permits judges of municipal corporation courts to practice law.

63. ABA CODE No. 5 (F).

64. ABA CANONS No. 31.

65. ABA CODE No. 5 (E).

66. *Id.*, *Compliance with the Code of Judicial Conduct*.

67. ABA CANONS No. 31; ABA CODE No. 4 (A).

68. ABA CANONS No. 8; ABA CODE No. 4 (B), (C).

69. See pt. IV, § E (3) of this comment.

ficult to formulate; nevertheless, a judge's health is an influential factor not only in his administration of justice, but also in the public's confidence in the judiciary.

IV. MISSOURI REMEDIES AND PROCEDURES TO HANDLE THE PROBLEM OF JUDICIAL UNFITNESS

A. *Concept of Judicial Independence*

Traditionally, formal proceedings to investigate a judge's conduct with a view to removal or discipline have been strictly limited in order to protect "judicial independence." The theory has been that in order for the judiciary to be a forceful branch of our system, a judge must be free from fear of reprisal when performing the judicial function.⁷⁰ Presumably, fear would reduce the impartiality of the judiciary, make judges overly cautious, and discourage new ideas and approaches to the law.⁷¹

This concept of judicial independence has produced the general rule that a judge is subject to neither civil suit nor criminal prosecution for his official acts of decision making, even if he disregards statutes, rules, and prior case law.⁷² Also, lack of legal competence is not grounds for removal. Thus, the unhappy litigant's only channel for relief from a poor decision is appeal to a higher court.

B. *Selection of Judges*

Prior to the recent trend toward procedures to remove or discipline unfit judges, a movement existed to curb judicial unfitness by reforming the methods of selecting judges. Missouri was the leader in this movement and in 1940 adopted a non-partisan court plan. Under this plan, when a vacancy occurs on the supreme court, the courts of appeals, and a few lower courts, the governor appoints a new judge from a panel of three candidates nominated for the vacancy by a non-partisan commission composed of judges, lawyers, and laymen.⁷³

After the judge has served an initial period of from one to two years, he may seek a full term by filing with the secretary of state's office a declaration of candidacy to succeed himself. The judge then runs unopposed without party designation on a ballot reading: "Shall Judge X of the Y court be retained in office?" If the judge fails to get a simply majority, his office is vacated, and the governor begins the process over again.⁷⁴ If the judge obtains a majority, he is retained and may seek successive terms in the same manner.

70. See Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U.L. REV. 149, 150 (1966).

71. See generally Frankel, *Judicial Discipline and Removal*, 44 TEXAS L. REV. 1117 (1966).

72. Note, *supra* note 70, at 151.

73. Mo. CONST. art. V, § 29 (a).

74. *Id.* at § 29 (C) (1). Judge Marion D. Waltner of Kansas City is the only judge not retained. Allegedly part of the Pendergast political machine, he faced voluminous adverse press coverage before he appeared on the nonpartisan ballot in the early 1940's. Braithwaite, *Removal and Retirement of Judges in Missouri: A Field Study*, 1968 WASH. U.L.Q. 378, 413-14.

C. *Aspects of Retirement*

1. Mandatory Age of Retirement

One controversial mechanism for removing judges is a mandatory retirement age. Presumably, lawmakers who vote for such statutes see them as an effective way to avoid having judges on the bench who suffer from incapacities of old age. Unless the mandatory age is so great that it could not possibly serve its intended purpose, however, the state will likely lose the services of many able and perceptive judges simply because they reach the mandatory age. Balancing these considerations, one will probably conclude that the mandatory retirement age is a more dignified and efficient alternative than dealing with infirmity caused by old age on a case-by-case basis.⁷⁵ In Missouri, the mandatory retirement age of 70 applies only to those judges selected under the non-partisan court plan.⁷⁶ Thus, the majority of the state's judges, including nearly all of the trial judges, are subject to no mandatory retirement age.

2. Retirement Benefits

In the past, Missouri judges frequently did not retire because they could not afford to do so.⁷⁷ In recent years, the state legislature has substantially increased judges' salaries and broadened their retirement benefits.⁷⁸ These changes make retirement more pleasant for Missouri judges. Moreover, they will encourage more able attorneys to set aside successful law practices in order to accept court positions.

D. *Impeachment*

One mechanism that is available for the removal of an unfit judge is impeachment. Impeachment is available against the judges of the supreme court, courts of appeals, circuit courts,⁷⁹ and the St. Louis Court of Criminal Correction.⁸⁰ The House of Representatives has exclusive power to begin the process.⁸¹ After functioning very much like a grand jury, the House drafts articles of impeachment against the judge if it decides good cause exists for his removal.⁸² The articles of impeachment are brought for trial before the Missouri Supreme Court.⁸³ At this point, the judge is automatically suspended from exercising his office until acquittal.⁸⁴ The House elects managers to serve as prosecutors.⁸⁵

The process is different if the judge to be tried is a supreme court

75. See, e.g., Missouri's Committee on Retirement of Judges and Magistrates. See text accompanying note 11-15 *supra*.

76. Mo. CONST. art. V, § 30 (adopted August 4, 1970).

77. Braithwaite, *supra* note 74, at 395.

78. For retirement benefit changes, see §§ 476.520-.570 RSMo 1971 Supp. For salary increases, see §§ 477.130, 478.013, 479.060, 481.205, and 482.150, RSMo 1972 Supp.

79. Mo. CONST. art. VII, § 1.

80. Section 479.080 applies the remedy to judges of the St. Louis Court of Criminal Corrections.

81. Mo. CONST. art. VII, § 2.

82. § 106.040, RSMo 1969.

83. § 106.030, RSMo 1969.

84. § 106.050, RSMo 1969.

85. § 106.040, RSMo 1969.

justice. In that case, the House transfers the articles to the Senate, which in turn elects seven eminent jurists from the circuit courts and appellate courts other than the supreme court to form an impeachment commission.⁸⁶

The rules of evidence and procedure that control civil actions in circuit court apply in an impeachment trial.⁸⁷ Conviction requires a five-sevenths majority of either the supreme court or the commission.⁸⁸

Impeachment is ineffective and rarely used in Missouri. Numerous deficiencies account for this. Impeachment proceedings cannot begin unless the legislature is in session. Also the legislature rarely acts prior to great public reaction, as in the Poelker and Hasler cases; minor instances of misconduct pass apparently unnoticed. Moreover, impeachment allows only removal or acquittal; it allows no intermediate remedies. The size of the lower house makes it an inefficient "grand jury." The monetary cost of an impeachment proceeding is great.⁸⁹ Finally, a prevalent impression is that because the legislature is involved, an impeachment becomes partisan.

E. Missouri Commission on Retirement, Removal and Discipline—Supreme Court Rule 12

1. Introduction

A 1970 amendment to the Missouri Constitution established the Commission on Retirement, Removal, and Discipline.⁹⁰ The function of the Commission is to investigate complaints concerning the state's judges and to make recommendations to the Missouri Supreme Court for final disposition. The constitutional provision outlines the basic elements of the new remedy and announces that rules of administration and procedure shall be prescribed by supreme court rule.⁹¹ Pursuant to this command, the Missouri high court adopted Supreme Court Rule 12, which became effective January 1, 1972. Although the discussion hereafter will refer to Supreme Court Rule 12 and its various sections, it should be remembered that the constitutional amendment itself prescribes the Commission.

The commission plan sets forth separate procedures for the retirement and discipline of judges. The procedures apply to the members of the Commission itself and to every judge, commissioner, or magistrate of any court of the state of Missouri. The Commission has a broad range of possible recommendations. Safeguards built into the system protect the complainant as well as the judge. The new commission has the potential to be Missouri's first effective method for safeguarding its citizenry from unfit judges.

86. §§ 106.040, .080, RSMo 1969.

87. See § 106.170, the last sentence of which reads:

Except as otherwise provided in sections 106.020 to 106.210, the rules of evidence and procedure applicable in civil actions in the circuit courts of this state shall be followed in all trials of impeachment whether before the supreme court or the special commission.

88. § 106.180, RSMo 1969. The Missouri provision that the supreme court or a special commission, rather than the senate, hears impeachment charges is unusual.

89. See text accompanying notes 156, 158 *infra*.

90. Mo. CONST. art. V, § 27.

91. *Id.*

2. Commission Structure

The Commission consists of six members: Two are Missouri citizens (not members of the Missouri bar) appointed by the state's governor; two are lawyers appointed by the board of governors of the Missouri Bar; one is a judge of the court of appeals selected by a majority of the judges of the courts of appeals; and one is a circuit court judge selected by a majority of the circuit judges.⁹²

These six members select from among themselves a chairman and a secretary.⁹³ The group may employ such personnel as it deems necessary.⁹⁴ Although the commission members receive reimbursement for actual and necessary expenses,⁹⁵ they receive no compensation. The Commission may request help in performing its function from the attorney general of Missouri and the clerk and marshal of the Missouri Supreme Court.⁹⁶

3. Procedure Relating to the Retirement of Judges

a. Informal Investigation

Anyone may suggest to the Commission that a judge be retired. The Commission may require that the request or suggestion be in writing and that it allege facts that indicate that the judge should be retired.⁹⁷ Under the Commission plan the standard for retirement is that a judge must be "unable to discharge the duties of his office with efficiency because of permanent sickness or physical or mental infirmity."⁹⁸ Upon filing of such a request or suggestion, the Commission must proceed with an informal investigation unless the request or suggestion is "obviously unfounded or frivolous."⁹⁹ The Commission notifies the judge of the investigation and gives him a reasonable opportunity to present matters as he may choose.¹⁰⁰ This stage of the process is summary and informal and not adversary in nature.

The Commission must keep records of the investigation and preserve the testimony of all witnesses at any proceeding.¹⁰¹ If the investigation does not disclose sufficient cause to continue, the investigation transcript is sealed and filed with the supreme court clerk; it is subject to inspection only upon supreme court order.¹⁰² If four of the Commission members find "probable cause" to believe the judge is unable to discharge his judicial duties with efficiency because of disability, a formal hearing ensues.¹⁰³

b. Formal Proceedings

The Commission begins formal hearings by serving notice on the judge to appear before the Commission on a designated date at a specific place

92. Mo. SUP. CT. R. 12.02 (a).

93. Mo. SUP. CT. R. 12.04 (a).

94. Mo. SUP. CT. R. 12.04 (b).

95. Mo. SUP. CT. R. 12.05.

96. *Id.*

97. Mo. SUP. CT. R. 12.06 (a).

98. *Id.*

99. *Id.* The Commission may investigate on its own motion.

100. *Id.*

101. Mo. SUP. CT. R. 12.16.

102. Mo. SUP. CT. R. 12.15.

103. Mo. SUP. CT. R. 12.06 (b).

and time to answer stated charges.¹⁰⁴ This notice is the only required pleading, although the judge may file a response with the Commission's secretary.¹⁰⁵ The judge shall receive upon request a transcript of any oral evidence and any documentary evidence that the Commission obtained during the formal investigation.¹⁰⁶ The rule that a supreme court order is necessary to divulge the identity of informants restricts discovery, however.¹⁰⁷

The clerk of the supreme court issues subpoenas and arranges for depositions requested by the Commission or the judge.¹⁰⁸ The Commission has the power to administer oaths, compel testimony, and require a physical or mental examination of the judge.¹⁰⁹ When four of its members concur, the Commission has the same powers as a circuit court to punish contempt committed during formal session or a refusal to obey lawful orders.¹¹⁰ The Commission conducts hearings under the rules of evidence and the Missouri rules of court.¹¹¹ The judge has a right to be represented by counsel, to present evidence, and to subpoena witnesses.¹¹²

Upon completion of the formal hearing, if three or more Commission members find that the judge should not be retired, all transcripts and records compiled during the informal investigation and the formal hearing are sealed and deposited with the clerk of the supreme court.¹¹³ These documents are subject to inspection only upon order of the supreme court. If four or more Commission members find that the judge is unable to discharge the duties of his office because of disability, the Commission recommends his retirement to the supreme court.¹¹⁴ Although the judge is disqualified from performing his judicial activities while the recommendation is pending, he continues to receive his full salary.¹¹⁵

Two copies of a transcript containing all records and evidence of all proceedings, along with the written findings of fact and conclusions of law of the Commission, accompany the recommendation.¹¹⁶ The clerk of the supreme court serves one copy of the transcript to the judge in question,¹¹⁷ who then may file with the supreme court a brief setting forth his objections to any of the findings or recommendations of the Commission.¹¹⁸ The Commission may file an answer brief, and the judge may file a reply brief.¹¹⁹ Upon the judge's request the supreme court will hear oral argument on the Commission's recommendations.¹²⁰

104. Mo. SUP. CT. R. 12.18, .19.

105. Mo. SUP. CT. R. 12.18.

106. Mo. SUP. CT. R. 12.14.

107. *Id.*

108. Mo. SUP. CT. R. 12.12.

109. Mo. SUP. CT. R. 12.13.

110. Mo. SUP. CT. R. 12.24.

111. Mo. SUP. CT. R. 12.20.

112. *Id.*

113. Mo. SUP. CT. R. 12.06 (b), 12.15.

114. Mo. SUP. CT. R. 12.06 (b).

115. Mo. SUP. CT. R. 12.07.

116. Mo. SUP. CT. R. 12.06 (b).

117. Mo. SUP. CT. R. 12.09.

118. *Id.*

119. *Id.*

120. *Id.*

After hearing any requested oral argument and studying the transcript and briefs,¹²¹ the supreme court either restores the judge to his office or finds him unable to perform the functions of his office because of disability. If the court finds the latter, it retires the judge. A retired judge receives one-half of his salary during the remainder of his term,¹²² and the time during which he is retired for disability counts as time served for purposes of retirement benefits.¹²³

4. Procedure Relating to the Removal, Suspension, or Other Discipline of Judges

A judge is subject to removal, suspension, or other discipline by the Missouri Supreme Court if it is found that he has "committed a crime or is guilty of misconduct, habitual drunkenness, willful neglect of duty, corruption in office, incompetency, oppression in office, or of any offense involving moral turpitude"¹²⁴ Anyone may give information to the Commission concerning a judge's shortcoming. Unless the complaint is frivolous or obviously unfounded the Commission proceeds with an informal investigation.¹²⁵ If necessary, the Commission holds a formal hearing with a possible subsequent recommendation to the supreme court.¹²⁶ In disability cases, retirement is the only remedy; in the misconduct field the Commission has broad discretion in shaping its recommendation.¹²⁷ As upon a recommendation for retirement, the supreme court, after reviewing the transcripts, records, briefs, and any oral argument, will consider the Commission's recommendation for removal, suspension, or other discipline, and make a final decision and order "as it deems just."¹²⁸ If the Commission removes a judge for misconduct, his pay ceases; moreover, he is entitled only to a refund of his actual contributions to the retirement benefits fund.¹²⁹

Supreme Court Rule 12 sets up a different procedure that the Commission may use whenever a judge is convicted in any court in the United States of an offense that involves moral turpitude or is punishable under Missouri or United States law as a felony.¹³⁰ When a judge is convicted, the Commission serves him with an order to show cause why he should not be suspended from office without salary.¹³¹ The order designates a time period

121. See Mo. SUP. CT. R. 12.06 (b).

122. Mo. CONST. art. V, § 27 (2); Mo. SUP. CT. R. 12.06 (b).

123. Mo. CONST. art. V, § 27 (2).

124. Mo. SUP. CT. R. 12.08 (a).

125. *Id.*

126. Mo. SUP. CT. R. 12.08 (b). The procedure is the same as that in proceedings brought to retire a judge. See pt. IV, § D (3) (b) of this comment.

127. The possible remedies range from reprimand to formal censure to removal. See Mo. CONST. art. V, § 27 (3); Mo. SUP. CT. R. 12.08 (b).

128. Arguably rule 12.08 (b) gives the court more discretion than does article V, § 27 (3) of the Missouri Constitution, which reads: "Upon recommendation by an affirmative vote of at least four members of the commission, the supreme court en banc, upon concurring with such recommendation, shall remove, suspend, or discipline any judge. . . ." (emphasis added).

129. § 476.560, RSMo 1971 Supp.

130. Mo. SUP. CT. R. 12.10. This rule is pursuant to article V, § 27 (5) of the Missouri Constitution.

131. Mo. SUP. CT. R. 12.10.

in which the judge may file a response.¹³² If the judge responds to the order, the Commission conducts a hearing at which the judge may present evidence and be represented by counsel.¹³³

If, after a hearing or a failure to respond, the Commission finds that the judge was convicted, the Commission may in its discretion recommend to the supreme court that it suspend the judge from office without salary. If the Commission makes such a recommendation, the supreme court must enforce it.¹³⁴ If the judge is suspended and the conviction becomes final, the supreme court must then remove the judge from office; if the conviction is reversed and the judge is discharged, the suspension terminates and the judge receives all salary for the period of suspension.¹³⁵

5. Comments on the Commission Plan

The four major goals of rule 12 would seem to be: (1) To provide a forum for grievances from the public concerning the state's judges; (2) to be an instrument for improvement of the judiciary; (3) to provide a procedure that will reasonably insure a fair and accurate determination of whether a judge should be retired, removed, or disciplined; (4) to fulfill the first three goals without creating new or collateral problems. Is rule 12 an adequate method to attain these goals? In attempting to answer this question, the experience of California, the leading state in this area, will be emphasized.

The public has ready access to the Commission. Anyone may write a letter of complaint to the Commission. One factor that might inhibit the public from utilizing this access is the prospect that the complainant's identity might be made public. In California, most complaints of substance come from lawyers,¹³⁶ who would be especially apprehensive about filing a complaint if they thought the judge might learn the complainant's identity. In Missouri, the judge is told of the existence of the investigation and the nature of the information or complaint against him, but he is not told the identity of the complainant.¹³⁷ The Commission does inform him of whether the investigation is on the Commission's own motion. Anonymity for complainants is best achieved if the Commission officially acts and investigates on its own motion and tells the judge of this, despite the fact that a particular person gave it impetus. This is the California practice.¹³⁸ The Missouri rule further states that although a judge receives a transcript and record of the investigation, the identity of informants is not for release to him unless the supreme court so orders.¹³⁹

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U.L. REV. 147, 178 (1966).

137. Mo. SUP. CR. R. 12.06 (a), .08 (a).

138. Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct*, 3 U. SAN. FRAN. L. REV. 244, 256 (1969). California further protects complainants and witnesses by a rule that makes statements made in papers filed with the Commission or in testimony given before it privileged for purposes of defamation. *Id.* The Missouri rules contain no comparable provision.

139. See note 107 and accompanying text *supra*.

Most writers reviewing the California experience think that the commission plan is an effective way of improving the judiciary.¹⁴⁰ Both the California and Missouri Commissions have broad jurisdiction to administer a variety of sanctions. For example, the California Commission often reacts to complaints concerning relatively minor matters, such as a judge's repeated tardiness in opening court or inexcusable impatience or discourtesy toward counsel or parties, by sending an informal letter to the judge that sets forth the alleged impropriety and requests that the judge terminate the misconduct. This technique may inform the judge of a shortcoming of which he is not cognizant; it often results in the judge correcting the flaw himself without fanfare. Closing the matter may be conditional upon cessation of the misconduct.¹⁴¹

In addition to applying these informal types of pressure, the Commission may select formal sanctions short of removal, such as reprimands, censures, or orders of suspension. During 1970, the California Supreme Court adopted a commission recommendation to censure a judge publicly because he made derogatory remarks at a juvenile hearing about a juvenile's family and members of his ethnic group.¹⁴² During its first year of existence, the Missouri Commission recommended to the Missouri Supreme Court that a supreme court judge be reprimanded for off-bench activity creating the appearance of impropriety. The court adopted the recommendation.

Rule 12.07 provides that the judge may not serve as a judicial officer when a commission recommendation for his removal, retirement, or discipline is pending before the supreme court. This operates to protect the public from unacceptable judges as soon as possible after the Commission finds sufficient reason to believe that the judge is unfit.

A basic principle of our country's advocacy system entitles defendants in criminal trials to the judgment of an impartial body after a prosecutor and the defense present evidence. Under Missouri's plan, however, the commission members investigate, prosecute, and pass judgment on a judge accused of misconduct. Arguably, the commission members have arrived at their decision when, upon completing an informal investigation, they decide probable cause exists to hold a formal hearing. Admittedly, the supreme court has the final decision, but the Commission's recommendation will undoubtedly carry great weight; the degree of impartiality that the recommendation reflects merits careful thought.¹⁴³ Because many questions of judicial misconduct under rule 12 will involve question of fact, the judging body should be scrupulously impartial. Perhaps a better system would have the Commission receive and investigate complaints about judges

140. See, e.g., Buckley, *supra* note 138, at 256; Note, *supra* note 136, at 178.

141. Frankel, *Judicial Discipline and Removal*, 44 TEXAS L. REV. 1117, 1131 (1966).

142. *In re Chargin*, 2 Cal. 3d 617, 471 P.2d 29, 87 Cal. Rptr. 709 (1970).

143. The procedure for discipline of attorneys provides a comparison. In Missouri, either a circuit bar committee or the Missouri Bar Advisory Committee investigates attorney misconduct. After a formal hearing the committee determines whether there is probable cause to believe the accused is guilty of the alleged misconduct. If probable cause is found, the committee proceeds to prosecute the attorney in a public trial, where an impartial body determines the lawyer's guilt. A lawyer unhappy with the result may appeal to the supreme court. See Mo. SUP. CT. R. 5.

to determine whether probable cause exists to prosecute the judge in a trial. The trial could be before the court of appeals with appeal to the supreme court, or perhaps, as in impeachment situations,¹⁴⁴ the trial could be before the supreme court.

In addition to instituting procedures for the operation of the Commission, rule 12 deals with some of the collateral problems caused by the concepts underlying these procedures. For example, the ready availability of the Commission to the public could be a nuisance if every complaint required an investigation, but rules 12.06 and 12.08 allow the Commission to control this potential problem by disregarding "obviously unfounded or frivolous" complaints. California and Colorado Commissions have had experience under comparable provisions. In 1970, the California Commission received 181 complaints, but dismissed 148 without investigation because they were obviously unfounded, frivolous, or not within the Commission's jurisdiction.¹⁴⁵ From May, 1967, to January, 1970, the Colorado Commission received 39 complaints and immediately disregarded 12 for the same reasons.¹⁴⁶ California reports that most complaints are from unsuccessful litigants seeking a cheap appeal.¹⁴⁷ Complaints of this kind are not burdensome for the Commission, and they may be therapeutic for unhappy litigants. In Missouri, the Commission does not notify the allegedly offending judge of these unfounded or frivolous complaints; this may obviate unnecessary tension and concern.

Probably the greatest problem that the commission plan creates is the danger that an unfounded or false allegation might be made public. This would harm a judge's reputation and unjustifiably have an adverse affect on public confidence in the judiciary. To control this problem, rule 12.02(c) requires that each member of the Commission and each of its agents and employees take an oath that he will not reveal, without a court order, any fact or information that he obtains relating to any matter or proceeding over which the Commission has jurisdiction.¹⁴⁸ Moreover, under rule 12.23 the papers filed with the Commission and proceedings before it are confidential unless and until the Commission recommends to the supreme court that the judge be retired, removed or disciplined. California has a similar provision; when conducting an investigation, the California Commission sternly warns anyone contacted for information of the requirement of confidentiality.¹⁴⁹ In Missouri, the Commission has power to punish for contempts committed in its presence while in formal session or for refusal to obey lawful orders or process issued by the Commission.¹⁵⁰ The Commission might be able to use this contempt power to enforce an order that all persons involved remain silent on the subjects of papers filed with the Commission and proceedings before it. This does not prohibit a person

144. See MO. CONST. art. VII, § 1.

145. *Commission on Judicial Qualifications: Report on 1970*, 46 CALIF. B. J. 204, 205 (1971).

146. Note, *A Study of the Colorado Commission on Judicial Qualifications*, 47 DENVER L.J. 491, 495 (1970).

147. Note, *supra* note 136, at 178.

148. MO. SUP. CT. R. 12.02(c).

149. Buckley, *supra* note 138, at 255.

150. MO. SUP. CT. R. 12.24.

from making an allegation about a judge to the press if he does not mention that the Commission is involved; the mere existence of the Commission and rule 12.23 will not prevent publicity about a judge's conduct.

The Missouri Supreme Court recently amended rule 12.23 to better handle the problem of publicity. The basic rule of confidentiality remains, with the additional treatment of the following situations: (1) When a judge is publicly charged with involvement in proceedings before the Commission resulting in substantial unfairness to him, he may request that the Commission issue a short statement of clarification and correction; (2) when a judge is publicly charged with having committed a major offense or having engaged in serious reprehensible conduct, and after an investigation or a formal hearing the Commission determines no basis exists for further proceedings or recommendation of discipline, the Commission may issue a short explanatory statement; and (3) when a formal hearing has been ordered in a proceeding in which the subject matter is generally known to the public and in which confidence in the administration of justice is threatened because of a lack of information concerning the status of the proceedings and requirements of due process, the Commission may issue one or more short announcements confirming the hearing, clarifying the procedural aspects, and defending the right of a judge to a fair hearing.¹⁵¹

Rule 12.08 (b) should also help control publicity. It permits a judge to resign immediately after the Commission completes its informal investigation of alleged misconduct and decides to proceed with a formal hearing. The effect of the resignation is to force the Commission to cease further proceedings, seal the file, and deposit it with the clerk of the supreme court.¹⁵² Although a sudden resignation may arouse suspicion, it reduces the possibility of adverse publicity. California, in fact, reports that resignation is the rule rather than the exception. Since California initiated its commission plan in 1960, only one recommendation for removal has gone to the supreme court, but in one six-year span alone 44 judges voluntarily left the bench during commission investigations.¹⁵³ This privilege raises a collateral problem: the judge qualifies for monthly retirement benefits if he resigns, but he does not so qualify if the supreme court removes him.

Finally, an attractive aspect of the commission plan is its low cost. The members of the Commission are not paid, and thus far Missouri's Commission has no salaried employees. Although California has a full-time salaried administrator, secretarial help, and a regular office, its budget is only about \$40,000 per year.¹⁵⁴ The cost of Missouri's plan will probably not approach this figure even when the Commission is better established. The cost of the commission plan compares favorably to the high cost of impeachment. According to one source, the direct cost to Missouri taxpayers for the impeachment of Judge Poelker¹⁵⁵ was \$15,864.¹⁵⁶ In addition, Poelker re-

151. Mo. Sup. Ct. R. 12.23.

152. Mo. Sup. Ct. R. 12.15.

153. Buckley, *supra* note 138, at 256.

154. Frankel, *Judicial Ethics and Discipline for the 1970's*, 54 JUDICATURE 18 (1970).

155. See text accompanying notes 5, 6 *supra*.

156. Braithwaite, *Removal and Retirement of Judges in Missouri: A Field Study*, 1968 WASH. U.L.Q. 378, 430.

ceived \$31,000 in salary while not hearing any cases because of charges pending against him.¹⁵⁷ The state of Florida held impeachments in 1957 and 1963 that cost approximately \$122,000 and \$115,000 respectively.¹⁵⁸

V. CONCLUSION

The goal of this comment has been to discuss the Missouri standards for judicial fitness, in conjunction with the mechanisms available to deal with flaws in the judiciary. The most recently adopted mechanism is the commission plan under rule 12. The general concept of the plan is progressive, but the supreme court should re-examine the Commission's control over investigation and prosecution, as it may conflict with the Commission's role as arbiter.

Each judge should conform his conduct to the appropriate standards. The judge himself is the best regulator of his own conduct; his responsibility is to insure public confidence in the judiciary.

R. JAMES STILLEY, JR.

157. See text accompanying note 6, *supra*.

158. Braithwaite, *supra* note 156, at 430.